No. 07-288

Supreme Court, U.S.
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In The Supreme Court of the United States

RONALD W. COTTRELL AND IVY WILLIAMS,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

REPLY BRIEF

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ARGUMENT

I. INTRODUCTION

The brief of Respondents National Collegiate Athletic Association, et al. ("NCAA") in opposition to the Petition for a writ of certiorari filed by Ronald Cottrell and Ivy Williams is a model of skilled denigration – denigration of the Petitioners themselves,[1] as well as their arguments to this Court. While their brief is speciously meritorious, upon closer inspection, the contentions turn out to be a forensic Potemkin Village. Its misleading statements of fact and law, and untrue assertions that certain issues were not raised below, are first aimed to undermine the jurisdiction of this Court to decide key issues and, failing that, to give false assurance that no issues presented by the Petition are worthy of review.

Perhaps the only thing the NCAA has not contested is that this Court *does* have jurisdiction over Petitioner's claims against the NCAA based upon the defamations published on its internet web site, Resp. at 21, as the Alabama Supreme

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[1] One denigration tactic the NCAA employs is to depict Petitioners as recidivist rule-breakers, although neither has ever been found guilty of any major rules violation. Resp. at 8. The NCAA states that Cottrell admitted to receiving an improper loan from an athletic program "booster," Logan Young, and that he did not fully disclose all relevant information. *Id.* However, the true record reflects that, Cottrell inquired in the Alabama athletic department regarding his need for a home loan, and that an athletic department official actually suggested the lender. [R.2124-37] The record also shows NCAA never specifically asked Cottrell about the loan. [C.5515-29] Further, Gene Marsh, then faculty representative to the Alabama athletic department and now a member of the NCAA Committee on Infractions [C.1591-2603], testified that Cottrell *did not hide* information about the loan from the NCAA. [R.2855-56] Cottrell admitted his conduct was a violation only because the Alabama athletic department requested him to do so. [R.2123] Although Williams may have exceeded the permitted number of recruiting visits (a mere secondary violation), the NCAA fails to note that he was cleared of any wrongdoing in the improper recruitment of the student-athlete for which Alabama was ultimately sanctioned. [C.5709-32; 5940-42] The same is true of Cottrell. [R.2855] Yet, since the NCAA investigation began, Cottrell and Williams have been unable to resume their college football coaching careers because of the damage to their reputations caused by the NCAA.

Court's "figure status" ruling applicable to those claims was plainly based upon federal constitutional law. This reply brief, within length constraints of court rules, demonstrates that jurisdiction also exists over the "conspiracy media leak" defamation claims and that certiorari review should be granted as to all the issues raised by the Petition.

II. CERTIORARI SHOULD BE GRANTED AS TO THE "CONSPIRACY MEDIA LEAK" DEFAMATION CLAIMS AND THE "NCAA INTERNET WEB SITE" DEFAMATION CLAIMS

The NCAA proffers two reasons why this Court should not review the Alabama Supreme Court's ruling on the Petitioners' "conspiracy media leak" defamation claims. It argues that this case is not a proper vehicle to consider the effect of a "gag order" on the legal status of a defamation plaintiff because, it says, Bylaw 32.1.4 is not a gag order. It also contends that this Court has no jurisdiction to review the lower court's conspiracy ruling because, it says, the court affirmed the trial court's summary judgment in favor of the defendants on independent state law grounds. However, the facts, and common sense, demonstrate that the bylaw was indeed a true gag order that unfairly prevented Petitioners from publicly defending their reputations when they most desperately needed to and, further, that the Alabama ruling shows this Court does indeed have jurisdiction to consider the issues raised by those claims.

A. Bylaw 32.1.4 is a True "Gag Order" Enforced by Coercion – A Point that Petitioners Made to the Alabama Supreme Court and in the Petition to this Court

The NCAA states that Bylaw 32.1.4 is not a gag order because Petitioners simply made a voluntary choice to comply with the confidentiality requirement of the bylaw during the investigation of the University of Alabama ("Alabama"). The NCAA also contends: "Petitioners have never argued, below or even in this Court, that their decision

to abide by NCAA bylaws was meaningfully coerced and have therefore forfeited any right to do so." Resp. at 24.

This latter contention is addressed first, because it is plainly false and must not be allowed to prejudice this Court's view of the merits of the Petition. The record demonstrates that Cottrell and Williams argued to the Alabama Supreme Court that their compliance with Bylaw 32.1.4 during the investigation, which they questioned because of their naturally urgent desire to respond to defamatory falsehoods published about them, was coerced by the threat of an "unethical conduct charge" made by Respondent Richard Johanningmeier, the NCAA's lead investigator. App. at 145, 161-62, 192-94.

Petitioners' principal brief to the Alabama Supreme Court quoted deposition testimony from both Cottrell and Williams recounting threats made by Johanningmeier to enforce their compliance with the bylaw, including the statement from Johanningmeier to Cottrell that he should not speak to reporters and he would receive an unethical conduct charge if he did so, and that the sanction was "the worst penalty that you can have." *Id.* at 193. The Petition to this Court also included the statement that Cottrell's and Williams' compliance with the bylaw was "enforced . . . by threat of an 'unethical conduct' sanction." Pet. at 12. Most assuredly, the Petitioners have not forfeited the argument that the bylaw was a gag order enforced by coercion.

The unethical conduct charges threatened by Johanningmeier would have effectively ended their NCAA college coaching careers immediately and, as such, were as plainly coercive as any power that could be yielded by a trial court enforcing a judicial "gag order." When faced with the express threat by Johanningmeier and the need to defend themselves from defamatory statements at a time when they were seeking employment, Petitioners were left with only two choices, each having an untenable result: (1) they could comply with Bylaw 32.1.4 and not speak out to rebut

defamatory falsehoods[2] (which resulted in injury so severe to Cottrell that in a press release the NCAA spitefully described his unemployed status as a "defacto show cause order," App. E at App. 176) or (2) they could violate the bylaw to defend their professional reputations and be victimized by the NCAA's harshest punishment. Faced with this Hobson's choice,[3] Petitioners did the only thing they believed reasonable at the time; they complied with Bylaw 32.1.4, knowing that, while there was a risk their professional reputations and careers could be permanently injured should they forego answering the defamations, the NCAA's unjust termination of their coaching careers through an unethical conduct penalty was an even worse consequence.[4] Thus, the NCAA's contention that the Petitioners made a voluntary, uncoerced choice to remain silent in the face of defamatory speech is both factually and legally wrong. Bylaw 32.1.4 is plainly a gag order, enforced upon the Petitioners by overt threats from the very parties involved in the dissemination of defamatory statements to news reporters.

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[2] At the time the defamatory statements were made, Petitioners were unaware of the activities of Respondent Tom Culpepper – who hated Cottrell and wanted to destroy him – with Johanningmeier and as a "secret witness" for the NCAA, App. at 135-40, or that Respondent Johanningmeier was speaking to news reporters, App. at 140, and were thus unaware of the origin of the published defamations.

[3] Many of this Court's opinions have used an analogy to the equally poor options offered by Thomas Hobson, an English livery stable owner, to his customers of either the nag in the stable nearest the door or no horse at all. *See, e.g., Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 793-94 (1994) (Justice Scalia's dissent). In *Zelma v. Simmons-Harris*, 536 U.S. 639, 707 (2002), Justice Souter noted in his dissent that a Hobson's choice is not a free choice: "The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian." (emphasis added). Petitioners were both obligated and coerced to comply with NCAA Bylaw 32.1.4.

[4] The NCAA admits as much by noting the impetus for Petitioners to comply with the bylaw was "*some benefit they considered more valuable than speaking,*" Resp. at 23. Of course, that "benefit" was merely the avoidance of an unethical conduct charge, the harshest penalty that can be levied by the NCAA.

Without specifically addressing the issue of a threatened unethical conduct charge, the NCAA appears to argue that there was no coercion because Cottrell and Williams merely made the decision to comply with the rules required for their continued participation in NCAA athletics, and thus simply received the benefit of a bargain they made when they embarked on NCAA college coaching careers.[5] That superficial argument is flawed; implicit in any bargain is the obligation of good faith and fair dealing by the parties on both sides to the agreement and, in this instance, Petitioners claim the NCAA breached such a duty of good faith by joining a conspiracy to defame and ruin the Petitioners. Once that breach of good faith occurred, the balance of any such a bargain was upset, and Petitioners' compliance with Bylaw 32.1.4 cannot reasonably be viewed as a voluntary speech restriction, particularly given the coercive threat of an unethical conduct sanction.

B. There are Several Bases for Jurisdiction to Review the Alabama Supreme Court's Ruling on the "Conspiracy Media Leak" Defamation Claims, as Federal Constitutional Issues are "Interwoven" with any State Law Issues

As previously noted, the NCAA argues that this Court does not have jurisdiction to review the Alabama Supreme Court's ruling on Petitioner's "conspiracy media leak" defamation claims because, it says, the court based its ruling on adequate and independent state law grounds. Resp. at 18.

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[5] The NCAA cites this Court's opinion in *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 197-199 (1988), for the proposition that "this Court has already rejected the notion that the NCAA's important role in college athletics renders a coach's agreement to follow its rules anything less than voluntary." The *Tarkanian* opinion, however, is simply not a refuge for every possible wrong the NCAA may commit, and the text cited does not support the proposition it is cited for. That section of this Court's opinion merely concluded that, under the facts of that case, the NCAA was not itself penalizing Tarkanian and that the NCAA did not become a state actor. *Tarkanian* is simply inapplicable to this case.

However, the thaumaturgic phrase, "bona fide, separate, adequate and independent grounds," *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983), is not used in the opinion. While the court (improperly drawing inferences against non-movants) did base the "no-conspiracy" part of its ruling on evidentiary grounds, concluding Petitioners failed to present what it believed was sufficient evidence of a conspiracy or of Respondents being the source of defamatory publications, it failed to cite *any* Alabama state court opinions as controlling the Petitioners' burden of proof on defamation claims. The court actually cited no case law whatsoever in the section of the opinion discussing the propriety of the trial court's summary judgment on the conspiracy media leak claims, App. at 80-82, and where it did cite case law on the issue of a plaintiff's burden of proof on defamation claims, it cited only opinions by this Court and a few Alabama cases which relied upon *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. App at 41-42. Thus, any state law evidentiary issues are plainly "interwoven" with federal constitutional issues to such extent that a basis for federal jurisdiction over the claims exists. *See New York v. Class*, 475 U.S. 106, 109 (1986) ("The opinion below makes use of both federal and New York cases in its analysis, generally citing them for the same proposition. The opinion lacks the requisite 'plain statement' that it rests on state grounds.") (citations omitted); *Caldwell v. Mississippi*, 472 U.S. 320, 327-28 (1985); *Long*, 463 U.S. at 1040-41.

Additionally, as noted in the Petition, there is also an important federal Due Process Clause issue "interwoven" with the conspiracy media leak claims which provides yet another basis for this Court's jurisdiction. The Petition alleges that Cottrell's and Williams' rights to due process of law under the United States Constitution were violated by the Alabama Supreme Court's ruling, which requires they produce direct evidence that the Respondents were the source of defamatory statements "leaked" to news media, when Petitioner's access to the only source of such direct evidence was barred by a statute giving an absolute privilege to news reporters and preventing discovery of their

sources for published information. Pet. at 25-30. This statute, Ala. Code § 12-21-142, one of the so-called "reporter's shield" statutes, is an absolute bar to a news reporter being compelled to disclose the source for information which is published. Pet. at 26. The due process violation was caused by "the Alabama Supreme Court's expectation of direct evidence" combined with "the Alabama Legislature's bar to such evidence." Pet. at 29.

The NCAA argues that this due process violation cannot provide a basis for jurisdiction over the conspiracy media leak defamation claims because, it contends, Petitioners failed to preserve the argument by making it below and have forfeited it. Resp. at 31-32. The NCAA again misrepresents the arguments made in Petitioners' appeal to the Alabama Supreme Court. The Petitioners argued on appeal to that court (obviously prior to the court's release of its opinion containing the requirement that their claim be proved with direct evidence) that because of the absolute evidentiary privilege afforded to news reporters by Ala. Code § 12-21-142, they could only present circumstantial evidence of the identity of the originators of the defamatory statements.[6] App. at 198. At that time, prior to the Alabama Supreme Court's ruling on the appeal, Petitioners could not have possibly anticipated that the court would require, as it did, that the claim be proven by direct

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[6] The NCAA notes that Petitioners deposed two "media witnesses," Paul Finebaum and John Longshore and that § 12-21-142 did not prevent them from doing so. The NCAA refers to the statute as the "Alabama media privilege law" to make it appear it applies to all media, and thus was no bar to deposing Mssrs. Finebaum and Longshore and would not be a bar to deposing others. However, § 12-21-142, more properly referred to as a "reporter's shield" statute, *see* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 5426 (2007), is by its own terms only applicable to persons "engaged in a news gathering capacity." Pet. at 26. Mssrs. Finebaum and Longshore, though involved in the sports media, are not reporters and are not "news gatherers." They are simply radio talk show hosts, and while Mr. Finebaum has recently written for a newspaper, he merely authors opinion columns, which differs greatly from news reporting, particularly with regard to First Amendment issues.

evidence. The NCAA's argument that Petitioners "have never even alluded to any due process problem in their briefs or argument to any of the courts below," Resp. at 31, is plainly inaccurate in that Petitioners did indeed raise the specter of the effect of Alabama's reporter's shield statute on appeal to the Alabama Supreme Court. App. at 198. It is simply unreasonable to contend that the Petitioners could have done more to preserve a due process issue with the Alabama Supreme Court before that court released its ruling on the appeal, when the court's opinion itself created the due process violation.

The NCAA also argues that Petitioners' claim of a due process violation by the Alabama Supreme Court is "wholly frivolous" and thus can provide no basis for jurisdiction. Resp. at 34. The NCAA contends that it would be within the right and prerogative of the Alabama Supreme Court to adopt a rule of Alabama common law requiring direct evidence to recover on tort claims such as defamation and civil conspiracy. *Id.* Petitioners do not argue that the Alabama Supreme Court lacks the power to adopt such a high evidentiary burden or that such a standard, in isolation, would violate a plaintiff's due process rights. Petitioners argue only that their due process rights are violated when such a high burden is combined with a state statute that prohibits the discovery of the evidence needed to meet that burden. Pet. at 25-30.

C. The NCAA Admits This Court Has Jurisdiction to Review the Ruling on the "Internet Web Site" Defamation Claims

The NCAA has not challenged this Court's jurisdiction to review the Alabama Supreme Court's affirmance of the dismissal of defamation claims against the NCAA arising from falsehoods published on its internet web site. Resp. at 21. It is indisputable that the lower court's ruling was based on an incorrect application of federal law – that the Petitioners were limited purpose public figures, as opposed to private figures. App. at 74-78. The effect of the NCAA gag order extends to these claims as well.

D. By Denying the Petitioners the Opportunity to Defend Their Reputations, the NCAA's Own Gag Order Defeated the Self-Protective Effort of the NCAA to Make Public Figures of the Petitioners

The Petition seeks a decision by this Court that the Alabama Supreme Court violated the First Amendment framework for defamation claims. Pet. at 19-24. Petitioners show that this Court's opinions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 223, 344 (1974) and *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979), among other cases, explain that media access to rebut defamatory falsehoods is an important characteristic of public figures. The natural corollary is that the complete absence of such media access, such as occurred here due to the NCAA's gag order, prevents a plaintiff from being a "limited purpose public figure." The NCAA contends that media access is a relatively unimportant aspect of public figure status. Resp. at 16. This issue, not previously addressed by this Court, is plainly ripe for review.

E. The Alabama Supreme Court Applied an Unconstitutional Standard Automatically Making All Persons Associated With a Public Controversy "Limited Purpose Public Figures"

Although the Alabama Supreme Court cited the proper First Amendment defamation law cases from this Court, such as *Gertz* and *Wolston*, it misapplied this Court's principles and developed a new standard inconsistent with this Court's standard for determining public figure status. Pet. at 12-24. The court concluded that simply by accepting job positions in the Alabama football program, Petitioners "played a prominent role in the public controversy," App. at 63, and "injected themselves into the public controversy," *id.* at 57; and it defined the "public controversy" as one involving Alabama's ongoing problem with compliance with various NCAA rules that

began as early as 1995[7] and lasted through the investigation ending in 2002. *Id.* at 7, 45, 57. The Alabama Supreme Court reached these conclusions without evidence that Cottrell and Williams called attention to themselves during the 2000-2002 NCAA investigation or presented their opinions to the public. *Id.* at 57. The court stated that, because of the high profile nature of the Alabama football program, by accepting employment they were placing themselves in a situation where there was a likelihood of a public controversy and assumed the risk of being defamed. *Id.*

Despite the NCAA's brief attempt at supporting such opinion, Resp. at 30, the court's employment-status analysis bears no resemblance to the standard established by this Court in *Gertz* and other cases. *Gertz*, 418 U.S. at 352. Instead, the lower court opinion is a resurrection of this Court's subsequently three-time rejected opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971). Pet. at 14-18. This Court should grant this Petition to reverse the Alabama Supreme Court's silent *Rosenbloom*-standard, making it clear that a person does not become a limited purpose public figure merely through intersection of his life with a public controversy involving other people. *See Wells v. Liddy*, 186 F.3d 505, 541 (4th Cir. 1996).

III. CONCLUSION

The Petition involves not only important legal issues of first impression, but also justice for two men whose professional reputations were destroyed and their lives inexorably altered through no fault of their own. Petitioners respectfully request this Court's review to clarify the standards in defamation cases that govern public/private figure status and due process protection where proof of "leaked sources" is blocked by press "shield" laws.

Respectfully submitted,

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[7] While Cottrell began employment at Alabama in 1997, Williams began coaching at Alabama in 1994, a date which even under the Alabama Supreme Court's reasoning, predated the public controversy. App. at 132. Accordingly, the Alabama Supreme Court ignored this fact of record and reached a ruling which is factually incorrect even under its own reasoning.

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